BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SARAH M. ALLEN Claimant	)	
VS.	)	
TACO BELL Respondent	)	Docket No. 1,019,084
AND	)	
ACE AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) and claimant requested review of the March 14, 2007, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on June 20, 2007. David W. Whipple and Sheila D. Verduzco, of Kansas City, Missouri, appeared for claimant. David F. Menghini and Katie Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant sustained a cumulative left knee injury through March 31, 2003, by repetitive use and cumulative traumas and, as a result, suffered a permanent functional impairment of 20 percent to the left lower extremity. The ALJ also found that no evidence was presented by either party as to the claimant's average weekly wage (AWW). But because the parties had stipulated that temporary total disability (TTD) benefits were paid for 5.35 weeks at the rate of $210.31 for a total amount of $1,125.15, the ALJ found the TTD benefits were paid using an AWW of $315.46. The ALJ noted that at the regular hearing, the parties indicated they were $17 apart in stipulating to an AWW. Therefore, the ALJ split the $17 and added $8.50 to the AWW used to determine the TTD compensation rate, finding claimant's AWW to be $323.96. The ALJ left open claimant's option to apply for future medical treatment for the injury.

The record is the same as that considered by the ALJ and consists of the transcript of the October 24, 2006, Regular Hearing and the exhibits; the transcript of the deposition of Dr. Truett Lee Swaim and exhibits 1 and 2; the transcript of the deposition of Dr. Ronald

Stitt and the exhibits; and the transcript of the deposition of Dr. Roger W. Hood and the exhibits, together with the pleadings contained in the administrative file. The Board has adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that the wage statement attached as an exhibit to claimant's submission brief to the ALJ is part of the record and the Board may consider the same even though it was properly not considered by the ALJ. The parties also stipulated that in the event the Board finds the claim is compensable, then March 31, 2003, should be used as the claimant's date of accident.

Issues

Respondent contends that claimant failed to prove that her injury arose out of and in the course of her employment. Respondent argues that there was no evidence presented, medical or otherwise, that claimant suffered an injury at work causing a torn meniscus in her left knee. Respondent also contends that claimant suffers from rheumatoid arthritis that was not caused or aggravated by claimant's employment. Respondent argues that any future medical in the way of a total knee replacement would be as the result of her arthritis and not from cumulative traumas incurred while working at respondent. Respondent also asserts that claimant failed to meet her burden of proving that she sustained a 20 percent permanent partial impairment of her left knee as a result of her employment. In response to claimant's argument concerning AWW, respondent contends claimant was a part-time hourly employee but requests the ALJ's finding in the Award be affirmed on this issue.

Claimant requests the Board affirm the ALJ's Award finding that she sustained a cumulative knee injury by a series of accidents that arose out of and in the course of her employment with respondent and, as a result, suffered a 20 percent permanent partial impairment to her left lower extremity. Claimant further requests the Board affirm the Award finding that she is entitled to future medical treatment and an award of 5.35 weeks of TTD compensation. Claimant, however, appeals the ALJ's computation of her AWW, arguing that her proper AWW is $349.65, as she was a full-time employee working 35 hours per week earning $9.99 per hour.

The issues before the Board are:

(1) Did claimant sustain an injury that arose out of and in the course of her employment with respondent?

(2) Did claimant sustain a permanent partial impairment to her left lower extremity as a result of her employment with respondent? If so, what is the percentage of her impairment?

(3) Is claimant entitled to future medical benefits?

(4) What was claimant's average weekly wage?

FINDINGS OF FACT

This 61 year-old claimant worked for respondent, a fast-food restaurant, for 14 years, except for a one-year period when she worked elsewhere. She was a full-time employee and worked 35 hours a week. Claimant's position at respondent was an opener. She went to work in the mornings and did food preparation, such as cutting onions and tomatoes and preparing the salsa. After the food preparation was completed, she would steam and clean. Steaming consisted of preparing food a customer had ordered. During the steaming process, claimant worked in a confined area, and the job required her to walk, turn and pivot.

Claimant does not remember when she first started noticing pain in her left knee but has had pain for a period of several years. She sought treatment from her personal physician, Dr. Lirio Mahmoud. Claimant had been previously diagnosed with rheumatoid arthritis in her knee and was on medication for this condition. In 2001, Dr. Mahmoud referred claimant to Dr. Ronald Stitt. Dr. Stitt gave her cortisone injections. The injections worked awhile, but the pain returned. In March 2003, Dr. Stitt recommended that claimant have arthroscopic surgery on her left knee.

Before claimant had the arthroscopic surgery, she talked to her supervisor, Jenny Harris, about being paid for the time she was off for the surgery. Claimant did not mention a specific work injury but told Ms. Harris that her knee had been hurting her and she needed treatment. Together claimant and Ms. Harris called the workers compensation insurance carrier and got approval. Claimant had surgery on her knee on April 2, 2003, and received TTD compensation until she returned to work on or about May 12, 2003. Claimant stopped working for respondent in November 2003 because she was afraid she would turn and fall and hurt her knee. She also became eligible to receive survivor benefits from her deceased husband's Social Security and decided to retire.

During part of the time claimant worked at respondent, she also had a part-time job at Big Lots. She started at Big Lots in early 2001 and worked as a stocker. The number of hours she worked at Big Lots varied from 3 to 15 hours a week. As a stocker, she would take a cart of merchandise and put the merchandise on shelves or hang the merchandise. This job required her to spend time both sitting and standing. She would also have to walk, turn, and pivot. But, unlike the job at respondent, the job at Big Lots allowed her to work at her own pace. She did not perform any task at Big Lots that required her to do any twisting with regard to her knees, although she would sometimes do some bending when stocking shelves. Claimant continued working this part-time job at Big Lots for about 18 months after she stopped working for respondent.

Presently, claimant's left knee continues to bother her, but not as badly as it did before her surgery. She still is cautious with the knee because she does not want to forget and turn around or pivot on it. Her pain is not constant but comes and goes. She avoids stairs and does not do a lot of kneeling, stooping, or bending. When her knee starts bothering her, she takes medication and sometimes put a heat pack or an ice pack on it. She has no trouble doing housework or shopping.

Dr. Ronald Stitt is a board certified orthopedic surgeon with a subspecialty in arthritis. He first saw claimant on July 2, 2001. According to her patient information questionnaire, she was complaining of left knee pain that had been ongoing for five or six years. Claimant already had a diagnosis of rheumatoid arthritis, and Dr. Stitt believed her left knee pain was related to her rheumatoid arthritis. Claimant continued to follow up with Dr. Stitt until October 18, 2005. At no time did claimant indicate that her condition was due to a work-related injury. From July 2, 2001, until October 18, 2005, claimant's diagnosis was rheumatoid arthritis.

Dr. Stitt gave claimant several steroid injections, beginning July 2, 2001. When claimant did not show much pain relief with the injections, Dr. Stitt knew something else was going on. In claimant's case, she had a meniscus tear. A meniscus tear is caused by a force on the knee. Normal walking can cause a meniscus tear. A person who is on his or her feet, walking, twisting, and turning would be more susceptible to a meniscus tear than a sedentary person. Dr. Stitt performed left knee arthroscopy on claimant on April 2, 2003, to repair the lateral meniscus tear. There is nothing in Dr. Stitt's records regarding any discussion he may have had with claimant about what caused her torn meniscus.

Dr. Stitt opined that claimant's left knee condition was not the result of a work injury. Dr. Stitt did not believe claimant's work at respondent accelerated her need for a total knee replacement, although it may have made her more symptomatic. Any standing, walking, pivoting or turning, whether at home or at work, would make someone with rheumatoid arthritis feel more pain, but it would not cause progression of the arthritis.

Dr. Stitt believes claimant will need future steroid shots to treat her rheumatoid arthritis pain and that she will eventually need a total knee replacement because of her rheumatoid arthritis. Dr. Stitt could not guarantee that the timing for claimant's need for a total knee replacement would have been the same if she did not have a full-time job. However, he said it was possible.

The only information Dr. Stitt had concerning claimant's job duties at respondent was that she did food preparation. After reading a job description of claimant's job at respondent, Dr. Stitt agreed that her work involved turning, stopping, walking, twisting, and pivoting. He stated that people who walk anywhere also turn and pivot and that turning and pivoting while working at respondent does not appear to be any different than turning and pivoting anywhere else in life. The fact that claimant worked in a confined space did not change Dr. Stitt's opinion.

Dr. Truett Swaim, a board certified orthopedic surgeon and board certified independent medical examiner, examined claimant on July 21, 2004, at the request of claimant's attorney. As part of his examination, he reviewed the medical records of Dr. Mahmoud, Dr. Stitt, and the Overland Park Regional Medical Center. Based on his review of the medical records, he diagnosed claimant with status post left knee arthroscopy, rheumatoid arthritis, left foot talonavicular synovitis/arthritis, and right foot second and third metatarsal/phalangeal joint synovitis/arthritis.

Claimant explained to Dr. Swaim her job duties at respondent. She explained that she stood the majority of the time, frequently twisted, and occasionally stooped and squatted. She lifted 40 pounds of meat twice a day. She reported that she began having discomfort in her left knee in the late 1990's. Claimant told Dr. Swaim that she had no history of a preexisting knee problem, other than she had a history of preexisting rheumatoid arthritis.

After examining claimant, Dr. Swaim diagnosed her with an arthritic condition of both knees with a history of rheumatoid arthritis, as well as post arthroscopy with partial lateral meniscectomy. Dr. Swaim opined:

> [T]he occupational cumulative trauma injuries that [claimant] sustained working for [respondent] between 1989 and 2003 aggravated her rheumatoid arthritic condition of the left knee and were substantial contributing factors to cause an acceleration and exacerbation of the arthritic condition of the left knee also.
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> The occupational cumulative trauma injuries she sustained working for [respondent] between 1989 and 2003 were substantial contributing factors to cause the necessity for the evaluation and treatment she had for her left knee condition since June 22, 2001, which would include the treatment for the lateral meniscus tear, which would be more likelihood that the lateral meniscus tear is related to the cumulative trauma than it is rheumatoid arthritis in and of itself.[1]

Dr. Swaim agreed that claimant's arthritis was not caused by her employment at respondent but said everyday activities would tend to aggravate arthritis. Every time pressure is put on the joint, there is a chance of aggravating the condition. Every time claimant walked, stood, kneeled, stooped, or bent, whether at work or away from work, she would have aggravated her arthritic condition.

Dr. Swaim rated claimant as having a 20 percent permanent partial impairment of the left lower extremity due to the left knee flexion contracture, a 10 percent permanent partial impairment of the left lower extremity due to increased valgus alignment, a 25 percent permanent partial impairment of the left lower extremity due to arthritis, and a 2 percent permanent partial impairment of the left lower extremity due to left knee partial

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[1] Swaim Depo. at 19.

meniscectomy. Using the Combined Values Chart, these impairments combine for a 47 percent permanent partial impairment of the left lower extremity. Dr. Swaim also rated claimant as having a 20 percent permanent partial impairment of the left lower extremity for the occupational cumulative trauma injuries. He stated that claimant's meniscus tear would be independent of her rheumatoid arthritis.

In regard to claimant's future medical needs, Dr. Swaim believes that she will need a total knee replacement of each knee because of her arthritic condition. He believes that the cumulative trauma injury she sustained while working for respondent accelerated and exacerbated the necessity for her to undergo a left total knee replacement, although her rheumatoid arthritic condition was also a substantial contributing factor. But for the work claimant performed at respondent, she would not have needed the knee replacement as soon as she does.

Dr. Swaim opined that claimant's job at Big Lots would be a contributing factor in regard to causation in this case because of cumulative trauma. It would not substantially change his assessment of the amount of impairment attributed to respondent. Offhand, he would opine that the job at Big Lots would have caused a 5 percent permanent partial impairment of the left lower extremity in addition to the 20 percent caused by her employment with respondent.

Dr. Roger Hood is board certified in rheumatologic surgery, a subsection of orthopedics dealing primarily with total joint replacements. He examined claimant at the request of respondent on March 9, 2005, about 18 months after she left employment with respondent. She was working at Big Lots at that time, which she tolerated better than the work at respondent. She told Dr. Hood that her knees are better now than they were. She was still on baseline rheumatoid medicine and had not had to increase her medicine for the last two years, meaning her knee arthritis was stable. X-rays taken by Dr. Hood showed that she was not bone-on-bone in the AP projection in any compartment of either knee. In flexion, she had some narrowing of the medial compartment of the right knee. She did not have effusion and walked with a normal gait. Alignment was satisfactory. She had crepitus in the patella femoral joint and some joint line tenderness medially on the right and laterally on the left. Dr. Hood did not find that any orthopedic treatment was needed.

Dr. Hood did not think that claimant's employment with respondent, or any other employment, caused or was a significant aggravating factor of her rheumatoid arthritis. He did not think the requirement of walking and pivoting in a confined area would aggravate rheumatoid arthritis. He thinks claimant will need total knee replacement but thought she was 10 years away from it when he saw her in March 2005. If she is very sedentary, she might escape it, but even doing household chores would cause enough pain that she would want it replaced. Claimant's work at respondent has no causal connection to her future need for total knee replacement but it would be related to her rheumatoid arthritis. Dr. Hood did not believe that claimant had any permanent impairment to her knees from her employment at respondent.

Dr. Hood agreed that a torn meniscus was not an arthritis process. Walking and standing rarely cause a meniscus tear. Twisting and turning can cause it. Hyperflexion from squatting or kneeling, getting a blow to the knee, or falling could cause a meniscus tear. It is not the majority, but a person with a meniscus tear could have additional future problems in the knee. If a person is more active on that knee, it is more likely he or she will have future complaints as compared to someone who is sedentary. After reading the job description of claimant's job and based on his own observations of food prep workers, Dr. Hood could not say that claimant's meniscus tear was more likely caused at respondent than anywhere else. Claimant's meniscus tear was causing her pain and complaints in her knee. Her work would have made this condition more painful because she was standing on her feet.

Dr. Hood opined that claimant's knees are better now because she is not on her feet as much. Dr. Hood did not think claimant's work at respondent caused the rheumatoid arthritis to progress any more than the arthritis normally would. She would have more pain working at respondent than someone with rheumatoid arthritis who was sedentary.

Although claimant testified she was a full-time employee of respondent and worked 35 hours a week, there was no testimony concerning her wage and no stipulation between the parties on an AWW. Claimant attached a wage statement to her submission letter of November 27, 2006. Although that wage statement states that claimant's hourly wage was $6.15, a review of the statement reveals her hourly wage was, in fact, $9.99. The wage statement reveals that claimant did not work a straight 35-hour week but worked a varying number of hours per week. Except for one bi-weekly period, it appears that her vacation time was based on a 7-hour work day. In the 26-week period before March 31, 2003, claimant earned $8,204.09 in wages, $341.16 in vacation pay, and $88.46 in bonus pay.

PRINCIPLES OF LAW

K.S.A. 44-501(a) (Furse 2000) states:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 44-508(g) states: "'Burden of proof'" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment. Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

K.S.A. 2006 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2006 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is

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[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277-78, 899 P.2d 1058 (1995).

[3] *Id.* at 278.

> shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[4] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[5] The evidence was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
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> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[6]

The Kansas Court of Appeals in *Johnson*[7] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

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[4] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

[5] *Id.* at 736.

[6] *Id.* at 738-39.

[7] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

In *Anderson*,[8] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
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> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
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> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

K.A.R. 51-3-8 states in part:

> The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:
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> QUESTIONS TO BOTH PARTIES
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> 10. What was the average weekly wage?
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> . . . .
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> 20. Have the parties agreed upon a functional impairment rating?
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> (b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of the record.
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> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

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[8] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

In *Neal*,[9] the Kansas Supreme Court stated:

> It is the intent of the legislature that the Workers Compensation Act (Act) shall be liberally construed for the purpose of bringing employers and employees within the provisions of the Act and to provide the protections of the Act to both. The provisions of the Act shall be applied impartially to both employers and employees in cases arising thereunder.
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> K.A.R. 51-3-8(c) does not shift the burden of proof to an employer on the issue of an employee's average weekly wage; rather, it attempts to limit the amount of litigation by identifying what issues will be in dispute. To achieve this purpose, an employer must have the payroll information available to answer any questions about an employee's wage. Contrary to the employer's assertion, this is different from having the burden to prove the average weekly wage. Once it is determined that wage is a disputed issue, the employee still has the burden to prove the average weekly wage.

K.S.A. 2003 Supp. 44-511 states in part:

> (a) As used in this section:
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> . . . .
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> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.
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> (b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> . . . .
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> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided

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[9] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, Syl. ¶¶ 1, 7, 81 P.3d 425 (2003).

in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

ANALYSIS

Claimant's job requires a significant amount of standing and walking on hard surfaces. The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[10] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[11] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work. Nevertheless, the record in this case fails to prove that claimant's work activities with respondent permanently aggravated or accelerated her rheumatoid arthritis condition. Rather, as stated by Dr. Stitt, those activities may have caused claimant to feel more pain but did not cause a progression of the underlying condition. Dr. Hood concurred with this analysis.

Claimant has likewise failed to prove that the torn meniscus condition resulted from her work with respondent. Dr. Hood described this as an injury that generally occurs as a result of a specific accident or force, as opposed to cumulative trauma. Claimant could point to no such incident having precipitated her knee symptoms. Dr. Hood said that absent claimant having experienced knee pain concurrent with an accident such as twisting her knee, then there is no way he can say whether the meniscus tear happened at work. Dr. Stitt described the meniscus tear as something that can occur without the person knowing how it happened. He said that any force, including normal walking, can cause a meniscus tear. He agreed that employment that requires a lot of standing, turning and twisting would make a person more susceptible to a meniscus tear than is someone in a sedentary job. Nevertheless, Dr. Stitt, the treating physician who performed the surgery on claimant's knee, would not relate the torn meniscus condition to claimant's employment. Likewise, Dr. Hood did not relate the meniscus tear to claimant's work activities. The Board is mindful of Dr. Swaim's contrary opinions but finds the greater weight of the credible evidence is that claimant's conditions are not work related.

CONCLUSION

Claimant has failed to prove her injuries arose out of and in the course of her employment with respondent. Accordingly, benefits are denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 14, 2007, is reversed and benefits are denied.

IT IS SO ORDERED.

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[10] *Boeckmann*, 210 Kan. at 737.

[11] *Johnson,* 36 Kan. App. 2d at 789.

Dated this _____ day of July, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David W. Whipple, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge